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TOWARD CREATING A POLICY OF PERMANENCE FOR AMERICA'S DISPOSABLE CHILDREN: THE EVOLUTION OF FEDERAL FOSTER CARE FUNDING STATUTES FROM 1961 TO PRESENT

Deborah L. Sanders*

INTRODUCTION

The formulation of clear national goals for children in foster care has been constrained by a limited awareness concerning the harmful effects of long-term foster care on children and of childhood development in general. The federal foster care funding laws emerged during a time when the notion of child-centered laws was itself taking shape, and originally were perhaps overshadowed by the more pressing social goals of securing civil liberties for the poor and minorities. With this in mind, the effectiveness of federal foster care funding laws should be measured both against our nation's incomplete understanding of children's developmental needs and the social conditions that existed prior to each incremental shift in the law.

Indeed, federal laws addressing the needs of children in foster care only made their first appearance in a 1961 welfare provision (the "1961 Act"), which offered funding to state agencies to care for children whose parents were unable to and allowed those children to enter into foster care.1 This 1961 provision, although seemingly innocuous, failed to design a mechanism for moving children out of foster care, and caused what would come to be known as "foster care drift."2 At the height of the national foster

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care failure, before the passage of the 1980 Child Welfare Act, nearly 400,000 children had fallen into the abyss created by the 1961 Act.\(^3\)

The 1980 Child Welfare Act\(^4\) attempted to remedy the one directional flow of children into the foster care system that resulted from the passage of the 1961 law through a provision that provided funding to states for children in foster care upon the condition that state agencies make "reasonable efforts" to avoid removal or to reunify families if removal was initially found to be necessary.\(^5\) The congressional desire to care for foster care children and to preserve families represented a social retraction of expanded adult liberties in the decades before the passage of the 1980 Act, and also indicated a retrenchment into more conservative family ideals. Underneath the 1980 statute’s intention to facilitate reunification or to avoid removal was a newly articulated goal of securing permanency in placement solutions for children in foster care. This goal was, and continues to be, supported by child experts as essential to childhood well being; however, the means for achieving permanence through foster care funding has since changed.

With the passage of the 1997 Adoption and Safe Families Act ("ASFA"),\(^6\) foster care funding laws have shifted the emphasis from family preservation to child safety with the intention of assuring permanency for children with the understanding that such a shift may mean giving up on parents. Despite the change in emphasis from preservation to child safety, the goal of permanence in foster care, whether through reunification efforts or more timely adoptions, has endured and continues to take shape as we become aware of the needs of children in general and the impact of these laws on children in foster care.\(^7\)

Even with Congress’s best intentions, modifications to the federal foster care funding laws still fail to keep pace with the law’s unanticipated, harmful effects. Much of Congress’s inability to project these negative effects resulted from the same limitations of knowledge that originally compelled the development of foster care funding laws from the beginning. But this is a limitation that must be expected while moving toward progress. Other harmful effects, however, have resulted from the failure to harmonize foster care laws with other laws that naturally intersect. Specifically, be-

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5. Id. at § 471(a)(15).
7. See Encouraging Adoption: Hearing Before the Subcommittee on Human Resources of the Comm. on Ways and Means, 105th Cong. 112 (1997) [hereinafter Encouraging Adoption Hearings] ("Permanency has a variety of connotations including notions of stability with respect to the home where the child lives and his or her relationship to caregivers. In the strictest sense, however, permanency refers to the place where the legal relationship between the child and the caregiver is most secure.").
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Caused foster care laws are no longer aligned with welfare reforms, these laws, which were once unified now conflict. Congress must continue to be committed to reevaluating the impact of foster care funding legislation in order to assure the best outcome for the nation's most vulnerable children.

This paper will analyze the creation and refinement of foster care policy through three federal statutes: the 1961 Act, the 1980 Act, and ASFA. These three statutes are progressive in their attempts to address problems related to foster care that were socially imminent and emblematic of the time periods and social attitudes from which they spawned.

The state of current foster care policy can best be viewed in light of the most recent statute; thus, this paper will examine in detail the passage and application of ASFA. This Act provides a framework for expediting the processes by which a child in foster care proceeds from temporary emergent care to a permanent placement solution. Operating through Social Security Act funding, ASFA provides incentives to states whose successful implementations of key provisions of the Act result in increased adoptions of foster care children.

ASFA operates as a catalyst for foster care policy through its funding mechanism, which creates a contract between the federal government and states by providing benefits to states that "voluntarily and knowingly accept" its terms. Thus, the rights of enforcement created between the federal government, offering funds, and those states that accept them under such a statute are typically confined to the terms of the agreement and therefore "do[] not . . . confer an enforceable right upon the Act's beneficiaries." For this reason, foster care policy, unlike other areas of the law, cannot be expected to develop through judicial interpretations of individual rights. Instead, development in foster care policy is reliant on legislative oversight and political pressure for change. Such change can only be anticipated where scrutiny by Congress is frequent and expectations are high.

Part I will examine the original foster care funding statute, the 1961 Act, which was intended to extend welfare subsidies to needy families where the primary wage earner became unemployed. Through its provision for

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9. The conditioning of federal funds in exchange for states' compliance is affected by Congress using the spending power of the Constitution and limits federal intervention to those aspects of the law related to the states' agreement for accepting funds. U.S. CONST. art. I, § 8 cl. 1 ("Congress shall have Power to ... provide for the . . . general welfare of the United States."). See also Lynn A. Baker, Conditional Federal Spending After Lopez, 95 COLUM. L. REV. 1911 (1995).
funding dependent children in foster care and its lack of an incentive provision aimed at driving children out, the law assured lengthy stays for children in foster care. The unintended effects of the 1961 Act created a need for national goals and policies for foster care children and led to the passage of the 1980 Child Welfare Act.

Part II will analyze the problems in society and foster care that prompted the 1980 Act and will introduce the idea that the formulation of foster care policy has paralleled our national consciousness concerning the developmental needs of children. Specifically, this part will discuss the creation of a federal policy for funding children in foster care, beginning with the 1961 Act, by examining an expanding cultural and legislative desire to cure existing inequalities in all aspects of society, including race and gender. Part II will also discuss the formulation, goals, and mechanics of the 1980 Act. By viewing the 1980 Act as a response to the harms experienced by children because of expanding adult freedoms, this part will also show how the 1980 Act advanced foster care policy toward the goal of permanence and will look at the growing emphasis on childhood well-being that inspired the 1980 Act's requirement that state agencies use "reasonable efforts" to either avoid placement, or to reunify families where placement was deemed necessary and which, through its frequently conflicted application created the need for the final statute, the Adoption and Safe Families Act of 1997 (ASFA).

Part III will discuss the development of ASFA as it represents an increasing social awareness concerning children's needs and of the failure of the 1980 Act to achieve its ideal of family preservation. Looking at ASFA's mechanics and potential, this part will show how ASFA embodies a more clearly enunciated policy promoting child safety and permanence, a policy that could only be possible through Congress's willingness to engage in responsible legislative reexamination of foster care.

Part IV will discuss both the projections and the impact of the 1997 ASFA legislation and present recommendations for continuing to sharpen our national goals for children in foster care. This part will also discuss the most recent legislation aimed at improving foster care, the Strengthening Abuse and Neglect Courts Act of 2000. This legislation provides funding for training judicial officers, agency staff, and court personnel to assure that ASFA timelines can be met, for tracking children in the system, and for ex-

13. Id.
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I. THE 1961 ACT: A NET IN SUPPORT OF UNEMPLOYED PARENTS AND A TRAP FOR CHILDREN IN FOSTER CARE

Congress's first federal foster care funding law, a nameless 1961 act, was one early attempt by the Kennedy administration to initiate President Kennedy's 1961 inaugural charge that the nation "bear the burden of a long twilight struggle against common enemies of man: tyranny, poverty, disease, and war." This desire to overcome the plight of the poor was in the political forefront of the early Kennedy administration, perhaps because of conflicts created by a steady migration, beginning in the 1940's, of poor minorities into American cities. Forced out of rural areas by an agricultural revolution that replaced their skills with the advances of mechanization, many of these displaced citizens became dependent on public assistance. As the numbers of poor became centralized and more cohesive, and the poor of "America's urban slums were no longer invisible," the idea that poverty was not part of the American experience became untenable. Along with attention to the economic distress facing many minorities and the poor, the

15. WALTER I. TRATTNER, FROM POOR LAW TO WELFARE STATE: A HISTORY OF SOCIAL WELFARE IN AMERICA 319 (1999).
16. Id. at 313 ("[President Kennedy] made poverty, unemployment, and hunger major themes for his party's nomination.").
17. Id. at 314. Trattner here argues, "This tremendous upheaval caused a good deal of suffering," and further notes that the social relief effort during the period from 1960 to 1970 doubled because of the "migration of large numbers of displaced farm workers to the . . . nation's cities where . . . relief was available to them for the first time." Id. However, as Trattner indicates, others have argued that the increase in public relief can be better attributed to the "increased political power of the mass black poor, who . . . had to be contended with in the nation's voting booths." Id. See, e.g., FRANCIS F. PIVEN & RICHARD A. CLOWARD, REAFFIRMING THE REGULATION OF THE POOR (1974).
18. TRATTNER, supra note 15, at 315.
19. Id.
Civil Rights movement lent a voice to an otherwise unrecognized political constituency.

The 1961 Act was one of President Kennedy's first responses to the new voice of the mounting urban poor. This law expanded welfare entitlements beyond women and children in homes without male wage earners to families where the primary wage earner exhausted unemployment benefits. Providing aid to intact families advanced the scope of welfare's subsidies for dependent children to include the idea of family hardship. This expansion was certainly in keeping with social imperatives aimed at achieving some degree of equality for the underrepresented. One of the most illustrative changes to welfare law brought about by the passage of the 1961 Act was the provision that officially changed the title of the program, now commonly referred to as welfare, from "aid to dependent children" ("ADC") to "aid to families with dependent children" ("AFDC"). However, this change was more symbolic than legally significant. While the 1961 Act went beyond its predecessor, which addressed only the needs of single women and children living in abject poverty, because states were not required to adopt the program, and many refused, the potential for this law to do any good was significantly undercut.

Although the 1961 Act explicitly aimed to impact social welfare policy, the statute's aims for children in foster care were more understated; it, nevertheless, shaped social policy regarding foster care in a meaningful way. The 1961 Act's stated purpose was to "authorize . . . financial participation in aid to dependent children of unemployed parents, and for other purposes." Funding for children in foster care was one of those other purposes, making benefits available to children whose parents qualified for AFDC, and who, because of abuse or neglect, needed to be placed outside of their home. Despite the lack of emphasis placed on children in foster care in the 1961 Act's purpose, the effects of the funding were enormous, primar-
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ily because funding was aimed at sustaining children in care and not at moving children out of the foster care system. Thus, the statute, with its lack of direction and funded influx of children into foster care, virtually assured the swell of children captured in the foster care net before the passage of the 1980 Child Welfare Act.

II. THE 1980 ADOPTION ASSISTANCE AND CHILD WELFARE ACT: A SHIFT TOWARD PERMANENCY THROUGH FAMILY PRESERVATION AND REUNIFICATION

The passage of the 1980 Adoption Assistance and Child Welfare Act reflected a shift in the policies concerning the needs of children in the foster care system.\(^{26}\) The original foster care funding provisions in the 1961 Act simply created a funding source to states for children in foster care whose families would have otherwise been eligible for AFDC money.\(^{27}\) The 1980 Act sought to create a disincentive for lengthy foster care stays by conditioning federal reimbursement for foster care maintenance payments upon a showing that state agencies had made reasonable efforts prior to the placement of a child in foster care, “to prevent the removal of the child from his home”\(^{28}\) and “to make it possible for a child to return home.”\(^{29}\)

In addition to foster care reimbursement payments, the 1980 Act provided adoption assistance funds to potential adoptive parents to encourage permanency where placement was determined to be necessary, and reunification was deemed inappropriate.\(^{30}\) The shift in policy can be defined as a move away from merely attempting to remedy inequalities by providing money to sustain children in the foster care system, to an emphasis on preventing the need for foster care in the first place or where removal was necessary, to provide services for the purposes of reunification.

Much of this shift in policy can be attributed to an evolving consciousness about children’s needs in general.\(^{31}\) While the 1961 legislation

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\(^{26}\) S. REP. NO. 96-336, at 1 (1979) (According to the Senate Report, the 1980 Act makes an overt shift in emphasis by refashioning “the incentive structure of present law [which] is modified to lesson the emphasis on foster care placement and to encourage greater efforts to find permanent homes for children either by making it possible for them to return to their own families or by placing them in adoptive homes.”).

\(^{27}\) Act of May 8, 1961, Pub. L. No. 87-31, §§ 407-408 (1961), 75 Stat. 75 (1961) (The 1961 Act expanded the definition of a dependant child for the purposes of AFDC funding to include a child who would meet the requirements of AFDC “except for his removal . . . as a result of a judicial determination to the effect that continuation therein would be contrary to the welfare of such child . . . who received aid under [a] state plan in or for the month in which court proceedings leading to such a determination were initiated.”).

\(^{28}\) S. REP. NO. 96-336, at 2, 3 (1979).

\(^{29}\) Id.


had its genesis during a period of social liberation, with its focus on social equality,\textsuperscript{32} the 1980 Act was born during a period of reflection about the effects of adult liberties on the well being of our children. Therefore, while the 1961 legislation was intended to address poverty in the spirit of AFDC by supplying an income source to needy families,\textsuperscript{33} it did not reflect a philosophy about long-term arrangements for children in foster care.\textsuperscript{34} Indeed, the Senate Report for the 1961 Act stated that the purpose of the bill was to "assist children who are in need because of the unemployment of a parent . . . [or because of] death, absence, or incapacity of a parent."\textsuperscript{35} Unemployed parents were the main focus of the 1961 Act, whereas children in foster care were so obliquely referenced—captured in the "incapacity of a parent" language—in the Act’s purpose statement that one might imagine that coverage of children in foster care was an afterthought.\textsuperscript{36}

Unlike the 1961 Act whose emphasis was on curing economic inequities created by social imbalances, the 1980 Act clearly reflects a strong awareness about the needs of children in foster care. Specifically, the 1980 Act declared as its goal the ideal of securing a permanent placement solution for children in foster care.\textsuperscript{37} Through the 1980 Act, Congress intended to achieve permanence through the use of services that would bolster family stability, thereby either preventing the need for removal, or if removal was deemed necessary, preparing the family for a child’s eventual return.\textsuperscript{38}
Congressional awareness of children’s need for permanence during the development of the 1980 Act was surely influenced by the growing tension between what had been an expanding concept of adult social freedoms in the 1960’s and a growing body of childhood studies in the 1970’s that began to expose the impact of these new family constructs on children. Thus, while no-fault divorce laws continued to expand the rights of adults in the 1970’s, many child psychologists and other experts, by this time, began to question the effects of such freedoms on a child’s need for stability and constancy. Despite whatever blame might be leveled against a loosening society for the harms that adult freedoms caused its children, it might be argued that the social revolutions of the 1960’s and 1970’s also permitted a similar revolution on behalf of children since a model of cultural uprising had already been established. The problem became one of balancing the competing interests of dependent children with their newly liberated parents.

One of the legal responses to the tension created by weighing the rights of adults against the needs of children was the creation of the “best interests of the child” standard. This standard began the move away from an earlier inquiry based upon which parent had the right to custody after divorce and attempted instead to make paramount the rights of the dependent amended in scattered sections of 42 U.S.C.). ASFA requires “a plan of services which will be provided in order to improve family conditions and facilitate returning the child to his home, or which will facilitate other permanent placement of a child . . .” The key mechanism for implementing the policy of permanence in the 1980 Act was the reasonable efforts provision which intended that the use of services would translate into such reasonable efforts “made prior to placement of the child in foster care to prevent or eliminate the need for removal of the child from his home; and . . . to make it possible for the child to return to his home.” See S. REP. No. 96-336, at 3. The important emphasis here is on preservation of the family.

39. See JOSEPH GOLDSTEIN ET AL., BEFORE THE BEST INTERESTS OF THE CHILD 199-200 (The Free Press 1979). “Scientific findings reinforce our conviction that . . . it is essential to provide [children] with continuity of both affectionate (emotional) care and cognitive stimulation.” Id. at 201.

40. Id. The authors begin the rumblings of the arguments that become foundational to the foster care statutes, claiming that the notion that children have an endless capacity to adapt and to sustain disruptions of their environment is dangerous to children. They also claim that the false belief that a child’s “cognitive resilience will protect him from, and enable him to overcome, earlier environmental deprivations, disruptions and losses, [is a] false reductionism assumption.” This claim becomes a prophetic warning when looking at the evolution in standards for foster care placement. ASFA confirms what these authors suspected in 1979. Specifically, they warned that “misplaced expectations [about the ability of children to adapt] have encouraged parents and policy makers to be too undemanding about standards of daycare or alternate arrangements for young children.”

41. D. KELLY WEISBERG AND SUSAN F. APPLETON, MODERN FAMILY LAW: CASES AND MATERIALS 567 (1998). In 1973, the Uniform Marriage and Divorce Act introduced a clause for no-fault separation with a waiting period of 180 days before a divorce could be granted.

42. See generally JOSEPH GOLDSTEIN ET AL., BEYOND THE BEST INTERESTS OF THE CHILD (1973), BEFORE THE BEST INTERESTS OF THE CHILD (1979) and THE BEST INTERESTS OF THE CHILD (1996). The work of Joseph Goldstein, Anna Freud, and Albert Solnit established a standard for both establishing guidelines for custody disputes and for laying a framework for the appropriate point of intervention for states where abuse and neglect are the issues. This work has culminated in the well-known trilogy.

43. NEFF, supra note 31, at 4.

In adopting the best interests of the child as a legal standard, legislators began to inject a new ideology into the legal climate. In this new era, parents were free to exercise their newly won liberties, but courts applied the best interests of the child standard intending not to impose those liberties upon their children.

Nowhere was this shift more evident than in divorce proceedings where applying the best interests of the child standard in most jurisdictions meant that before a custody determination could be made parents had to be evaluated according to a list of factors in order to determine parental fitness. This approach replaced two earlier gender-dependent presumptions used by courts to determine which parent would be awarded custody: the paternal preference which operated before the mid-nineteenth century, and the maternal preference, known as the “tender years doctrine,” which operated from the mid-nineteenth century until being replaced by the gender-neutral best interests of the child standard in the 1970’s. Both of the earlier approaches, the paternal preference and the tender years doctrine, made conclusions about the care of children based on societal presumptions of adult gender roles, and in doing so focused long-term child care on adults rather than on children. Yet, even if the conclusion was flawed in its presumption that one sex was more competent in terms of caring for children than the other, the tender years doctrine is important for our purposes because it

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45. Weisberg, supra note 41, at 805.
46. Uniform Marriage and Divorce Act § 402 9A U.L.A. 147 (1987). Some of the factors considered in determining a child’s best interests in custody actions include: “the wishes of the child as to his custodian; the child’s adjustment to his home, school and community; [and] the mental and physical health of all individuals involved.” Most jurisdictions still impose the best interest of the child standard, although much current debate centers around the subjective nature of judicial interpretations of what constitutes best interests.
47. See Mnookin, supra note 44.
48. Mary Kate Kearney, The New Paradigm In Custody Law. Looking At Parents With A Loving Eye, 28 ARIZ. ST. L.J. 543, 546-51 (1984). Custody laws originate from English and Roman laws that ascribed certain property-like rights of children to their fathers. Thus, before maternal preference in custody decisions, children were treated as the property of their father for two reasons: first, children were regarded as property. Second, women were not considered distinct legal entities; thus, they could not own property. English common law eventually gave way to notions of parental fitness; however, unless proven otherwise, a father was presumed the natural guardian. Early American common law borrowed these basic principles from the common law of England, giving fathers both the “duty to support,” and the consequential rights to children that flowed from that duty.
49. Id. at 548. The Tender Years Doctrine expresses the notion that the needs of children “of tender years” are better cared for by their mothers.
50. Id. (Many courts applying this standard articulated what could be viewed as an early version of the best interests of the child standard by claiming that it was in the child’s best interest at a young age to be cared for by the mother. Other courts, however, expressed sympathy for the mother, claiming that when the “child is very young, the courts are always loathe to deprive a mother of custody.” This mixed approach may capture the ambivalence of lawmakers to move away from adult rights toward children’s needs. It may also reflect the limited knowledge of courts and child specialists about what the best standard was in determining who should have custody, and about what that determination should be based on. A close inspection of the holdings of many “tender years” cases reveals the seeds of the “best interests of the child” standard, but it would be some time before the child’s interests were viewed as distinct from the parent’s rights.).
represents the notion that custody laws were becoming at least vaguely more child-centered.

The significance of viewing the new child-centered trend through its evolution in divorce and custody laws is that although the needs of children in foster care were clearly not as visible as the needs of children in divorce during this period, a focus on the needs of dependent children, rather than their liberated parents, in divorce settings permitted a correlative shift in focus on the needs of children in the foster care realm. Children in divorce were visible because divorce laws could be seen as reflecting an undoing of restrictive societal norms about marriage. Divorce laws—especially no-fault divorce laws—in the 1970’s were seen as progressive, and in many ways, positive.51 Foster care, on the other hand, was seen as perhaps a societal unmentionable. In this way, laws addressing the needs of children in foster care could only hope to advance on the backs of more prominent social changes regarding child development and child psychology.52 This is especially true about laws affecting children that played out in divorce proceedings. Similar to the trend toward disregarding gender prescriptions of fitness by applying the best interests of the child standard in divorce, lawmakers in the 1980 Act can be seen as attempting to de-emphasize the rights of parents and instead to focus on the best interests of children in the system. The 1980 Act was, therefore, laudable in its desire to articulate any legislative policy concerning the well being of children in foster care, especially since the original 1961 statute contemplated only the physical and economic needs of children in foster care.53

Because conventional norms had given way to new ideas about families and about children’s needs within them during the twenty years before the 1980 Act, the effects of such social changes on children could not be immediately anticipated. By the time the 1980 Act was being considered, experts and lawmakers began to calculate the social costs of not addressing the collective losses to children lingering in perpetual states of familial uncertainty.54 Most of the effects projected by child development specialists

52. See Encouraging Adoption: Hearing on H.R.-3 Before the Subcommittee on Ways and Means, 105th Cong. 18 (1997) [hereinafter Encouraging Adoption Hearings] (Statement of Valora Washington, Program Director, Families for Kids Initiative) (claiming that issues related to children in foster care “remain invisible” while public awareness concerning children and adoption is centered on “a relatively few healthy, white infants and toddlers who have been fought over in the courts by well-fixed nuclear families embroiled in custody disputes.”).
53. NEFF, supra note 31, at 4. In a statement issued in 1969, before the formulation and passage of the 1980 Act, Joseph Reid, Executive Director of the Child Welfare League of America argued: “[W]e need an educational campaign to establish the rights of the child as paramount, even above the rights of parents — certainly equal to the rights of parents. There are no statutes that specifically state what a child is entitled to.”
caused by lengthy foster care placements amounted to what such experts described as problems with attachment capacity, security issues and disrupted development in general. Along with the increased awareness of the harms to children caused by long-term foster care, were the daunting figures of how many children were expected to become trapped in the foster care abyss. According to the Senate Report that accompanied the bill for the 1980 Act, then titled the “Social Services and Child Welfare Amendments of 1979,” approximately 478,000 children were languishing in foster care as of 1977. While the majority of children, nearly 400,000, were in family foster homes, the remaining 78,000 were in institutionalized settings. Moreover, in 1977 a child could expect to spend a median of two and one half years in foster care, with thirty-eight percent of all children spending in excess if two years.

A. Goals of the 1980 Act

With discontinuity being the key protagonist in childhood development concerns both in society and in the law, the 1980 Act was a logical extension of a new ideal toward securing a permanent environment for children in foster care. The 1961 Act had failed to establish a policy beyond the intention to fund AFDC eligible children in foster care. In failing to articulate a policy, the 1961 Act had the undesired effect of assuring lengthy foster care stays through the very funding that was intended to offer foster care children an equal opportunity. Because the law provided no incentive for moving children out of the system, foster care, under the 1961 Act, became a last stop for many children.

In addition to the problems created by the 1961 Act’s failure to provide a mechanism that drove children out of foster care once they were ushered in, social reluctance to terminate parental rights further assured lengthy foster care stays because in order to honor the biological tie, courts needed to deny children the formation of a prosthetic parental relationship. This con-
Conflict was captured in the 1977 Supreme Court decision *Smith v. Organization of Families.*

In *Smith*, the Court denied that foster parents had a liberty interest in the final dispositional determination of the children's placement; since the goal of foster care, according to the Court, was to "prepare the child for his return to his real parents or placement in a permanent adoptive home..."63 The Court further asserted that prolonged care of a child by a foster care family did not create "some sort of 'squatter's rights,'" and that a foster parent's "mere subjective 'expectancy'" was not a liberty interest protected by the Due Process Clause.64 Despite the Court's refusal to find that foster care parents had a constitutionally protected interest in the disposition of the children for whom they cared, the Court recognized the inherent conflict in most foster care schemes. In recognizing this conflict, the Court observed that "the warmer and more homelike environment of foster care is intended to be its main advantage over institutional care, yet because... foster care is intended to be only temporary, foster parents are urged not to become too attached."65

The *Smith* Court revealed a true discontinuity in the law's approach before the 1980 Act, and captured a key reason for its development. Foster care determinations, before the 1980 Act, were subject to a number of erroneous and conflicting policies that on the one hand held fast to the ideal of parental autonomy and family unity and on the other responded to a desire to make some safe alternative available through funding a child's shelter away from home where a parent's care failed. The 1980 Act sought to bring what had been undefined in foster care practices and policies into focus and to create a plan that was more comprehensive than one that aspired only to providing the money needed to feed and clothe children. The 1980 Act was novel in its attempt to create national goals for the future of children destined for foster care. Indeed, the 1980 Act was most impressive in its formulation of a legislative opinion concerning the effects of long-term institutionalized care on children at all, and in its desire to respond to what the *Smith* Court referred to as "rather persuasive, if still incomplete, evidence that throughout the United States, children in foster care are experiencing high rates of psychiatric disturbance."66 The goals in the 1980 Act were to

63. *Id.* at 861.
64. *Id.* at 860.
65. *Id.* at 836 n.40.
66. *Id.*
The echoes of child psychologists urging permanency from a decade past reverberate throughout the 1980 Act’s legislative history, the statute itself, and finally through the Act’s proposed regulations. The Senate Report, for example, expressed the committee’s intention to “move children out of foster care into more permanent situations . . . back into their own families or into adoptive homes . . . .” Where courts determined that adoption or reunification was not possible, the report states that the committee intended to provide funds to smaller homes of less than twenty-five children in order to move children “from large, highly institutionalized private institutions into smaller institutions which more nearly approximate the atmosphere of a home.” In addition to the sentiments of committee members encouraging permanency and reunification, the Department of Health and Human Services proposed — but never adopted — regulations after passage of the act that would have “prevent[ed] children from getting lost in the system” by requiring states to provide services to “help enable children to stay at home with their birth parents, [assist] families to get back together as soon as possible . . . and [encourage] families to adopt children with special needs.”

B. Mechanics: The Reasonable Efforts Requirement

The 1980 Act incorporated Congress’s goals of permanence and shortened foster care stays by requiring state agencies to (1) make reasonable efforts before placing a child in foster care; (2) prevent or eliminate the need for removing the child from his home; (3) facilitate the return of the child to his or her home if removal was deemed necessary; and (4) provide funding for adoption assistance where the termination of parental rights is expected. Congress expected state agencies to satisfy the reasonable efforts requirement with supplementary services to families with the hope of either preventing removal or encouraging timely reunification. Although the statute

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67. S. REP. NO. 96-336 at 14 (1979) (“The committee agrees that it would be appropriate and desirable at this time to modify the [1961] law in a way which will de-emphasize the use of foster care and encourage greater efforts to place children in permanent homes.”).
68. Id. at 14.
69. Id. at 16.
72. H.R. REP. NO. 96-900 (1980). The report defines services as those services which supplement or substitute for parental care and supervision for the purposes of “preventing or remedying or assisting in the
did not define what constituted reasonable efforts, it is significant that a House Committee report summarizing the bill listed the reasonable efforts requirement as a new feature of existing law under the heading of "Preventative and Reunification Services."73

The Act’s case review system is the key mechanism for assuring that states make reasonable efforts to prevent removal, or, where removal is necessary, to reunify children with their families.74 The case review system was intended to ensure that children receiving maintenance payments would be evaluated for the appropriateness of their placement in foster care.75 Another purpose of the case review system was to give proper care and services to both the child and the child’s parents in an effort to maximize the family’s potential for reunification (or, in the alternative, to facilitate a timely permanent placement).76 In addition to projections about a child’s future after foster care, the case review system was intended to monitor the ongoing care and appropriateness of a child’s existing placement situation with the immediate goal being that a child “achieve placement in the least restrictive (most family like) setting.”77

The 1980 Act was unique in its provision for subsidizing adoptions by authorizing federal matching payments to parents who adopted children with special needs.78 Under the 1980 Act, a child was defined as having special needs if he could not be returned to the home of his parents or there existed a specific factor or condition (such as the child’s ethnic background, age, . . . membership in a minority group, or the presence of factors such as medical, . . . physical, mental or emotional handicaps) because of which it is reasonable to conclude that the child [could] not be placed with adoptive parents without providing adoption assistance.79

Adoption assistance was key to progressing the 1980 Act beyond the scope of its 1961 predecessor for two reasons. First, despite the Act’s stated preference for preserving families, the adoption assistance provision supplied a funded alternative to reunification where returning a child home was...
In doing so, Congress articulated at least a minimal standard for the care of children that went beyond the 1961 Act's provision for financial support and shelter. Second, the adoption provision illustrated the beginning of a legislative acceptance that some families could not be reunited, and that children should not have to forfeit precious years of their childhood in the interest of serving the family preservation ideal.

C. Failures of the 1980 Act

The 1980 Act sought to arrest the profuse flow of children into the system by more carefully monitoring a child's entrance into foster care and by more rigorously planning a way out. This approach was what the legislature called an "open-ended adoption assistance program and a closed-end foster care program . . . ." Yet, despite the Act's commendable foresight, it failed at two levels. First, it failed to meet the projected goals of avoiding foster care placement and facilitating return after placement. Second, it failed at a level of aspiration not yet envisioned by policy makers. That is, in order to succeed at its goal of propelling children out of the state of foster care limbo, Congress would have had to express more sharply defined goals for our national expectation of the future of children in foster care. A goal that made permanence primary over reunification had not yet been articulated in the 1980 Act, nor did experts hold up such a goal as being the one to which our foster care policies should aspire. Instead, experts and legisla-

80. The reasonable efforts provision required that state agencies offer significant services with the object of assuring family preservation before removal. 42 U.S.C. § 671(a)(15). Further, the Act provided that similar effort be made after removal toward the goal of reunification. In this way, the mechanics of the Act state a preference for maintaining the integrity of the family. Other key aspects of the law, however, take the stand that permanency is the primary goal. For example, the Act's requirement that a dispositional hearing be held after eighteen months to determine the child's future status was designed as a safeguard to assure that children do not remain in foster care indefinitely. The adoption provision, then, can be seen as a fail-safe mechanism, designed to operate only after the family preservation ideal failed. Despite the visionary quality of this provision, it failed to provide the additional layer of safety Congress intended because judges were generally still reluctant to terminate parental rights.


82. See Adoption Promotion Act of 1997: Hearing on HR-867 Before the Subcommittee on Human Resources, House Ways and Means Committee, 105th Cong. [hereinafter Adoption Promotion Act Hearings] (1997). According to the record, "nearly 500,000 children resided in foster care" as of the date of the hearing, most spending up to three years. The number of children in foster care had increased by eighty-nine percent since 1982—two years after the passage of the 1980 Act. See also, supra note 72. "The percentage of children who exit foster care through adoption has decreased. While adoption was the permanency goal for fifteen percent of foster care children in 1990, only eight percent of the children who left foster care in 1990 were adopted. In addition, the median age of children in foster care has dropped to 8.6 years in 1990 from 12.6 years at the end of 1982." Id.

83. Id. ("[T]his bill represents a philosophical shift from the federal policy that makes every effort to reunite children with their biological families to one that defines when reasonable efforts shall not be made and when those children shall be placed in permanent, loving adoptive homes.").
tors claimed family preservation and reunification as the stated goals of the 1980 Act.

The 1980 Act reflected what had been a cultural entrenchment\textsuperscript{84} in the idea of family preservation, so that saving children, in terms of the 1980 law, meant making their homes livable or returnable.\textsuperscript{85} Although a provision for adoption assistance did indeed exist through the Act’s adoption assistance mechanism, courts and agency workers were still reluctant to terminate parental rights.\textsuperscript{86} Ironically, one of the main features of the 1980 Act—the requirement that agencies make reasonable efforts before removing a child, and if removed, to make the same reasonable efforts to return the child as quickly as possible—eventually had the effect of frustrating the 1980 Act’s purpose.

Among the specific failures of achieving permanency caused by the reasonable efforts requirement, the most profound were those related to the timing of the requirement to use reasonable efforts. For example, the requirement that agencies use reasonable efforts in state parental termination statutes prior to removal often had the effect of acting “as a condition precedent to removing the child from the parental home.”\textsuperscript{87} Courts could refuse to remove a child where it was determined that reasonable efforts were not made to restore the family. Because the 1980 Act merely provided incentives for states to make reasonable efforts, it clearly was not intended to act as a stalling device for removing children from harms way. However, the use of the reasonable efforts requirement to defer removal was a way in which judges and agency workers could avoid making the difficult removal decision. On the other end of the timing spectrum, after removal had already occurred, agencies and courts could refuse to terminate parental rights because of a failure on the agency’s part to show that reasonable efforts had been made, thereby assuring that a child would languish in a temporary care situation.\textsuperscript{88} At this point in the process, since children were safely tucked away in temporary care, judges were more likely to rigorously scrutinize the reasonable efforts requirement because overt harm was not the issue at this

\textsuperscript{84.} Encouraging Adoption Hearing, supra note 52. (Statement of Mark V. Nadel, Associate Director, Income Security Issues, Health, Education, and Human Services Division, U.S. General Accounting Office). “Initiatives are not self-implementing and often require a cultural change . . . in the way that decision makers view the termination of parental rights.”

\textsuperscript{85.} Id. (“The 1980 Child Welfare Act clearly made the priority reunification of families.”).

\textsuperscript{86.} Id. (Statement of Mark V. Nadel, Associate Director, Income Security Issues, Health, Education, and Human Services Division, U.S. General Accounting Office) (“Many caseworkers saw termination as a failure on their part . . . . As a result, they seldom pursued termination and instead kept the children in foster care for longer periods.”).

\textsuperscript{87.} Inclusion, supra note 2, at 155.

\textsuperscript{88.} Id. at 157.
The result was to keep children in their temporary situation longer, without the hope of a plan for permanency. Much of the hesitancy in pushing for permanency at either the initial removal stage, or at the point where return was being contemplated, resulted from systemic ignorance about the developmental effects on children in long-term foster care. This part of the problem with the 1980 Act was less a failure than a lack of awareness. The cultural climate was perhaps less sensitive to the subtle harms of a situation that may not have been abusive, but was nonetheless not conducive to healthy childhood development. The harms to children in long-term foster care, later articulated by child experts, included such intangible injuries to children’s psyche as “loyalty conflicts, identity problems, and difficulty in making emotional commitments to their caretaker . . .” Certainly, the national consciousness had not yet apprehended such psychological maladies in our adult population in the years during the preparation and passage of the 1980 Act, let alone considered how such harms would affect children.

In addition to the timing problems related to the reasonable efforts requirement, there was a considerable amount of inconsistency in the application of the requirement of reasonable efforts that resulted from the general ambiguity of the phrase itself. Much congressional weight was packed into the notion of reasonable efforts because those efforts were supposed to facilitate preservation or reunification of families. Yet what constituted reasonable, and what exactly were the efforts to be taken, remained undefined in the text of the 1980 Act. In most cases, reasonable efforts translated to subsidizing services for families, but often children would languish in temporary placements while such services were given in the hopes of making the family stable enough for the child to return. Often that strategy failed.
By the time Congress was considering the 1997 Act (ASFA), many realized that something more specific would need to be attached to the reasonable efforts language in order for it to be effective.\footnote{Evolution of Federal Foster Care Funding, supra note 97.} The absence of more clearly defined requirements concerning reasonable efforts in the 1980 Act may suggest that legislators avoided directing states specifically as to what such reasonable efforts should be in an effort to respect traditional beliefs that "child welfare matters [are] to be governed primarily by state law."\footnote{Id.} Some inferences of Congress's reluctance to meddle into state interpretations of ASFA can be drawn from what the Act does not state. First, the text of the statute fails to clarify the requirement. Second, the Department of Human Services addressed the issue of defining reasonable efforts in a proposed regulation published prior to the passage of the 1980 Act,\footnote{Implementing the Adoption Assistance and Child Welfare Act, 45 Fed. Reg. 83,172 (December 17, 1980). The proposed regulations were intended to define "reasonable efforts."} however no such regulation was ever issued.\footnote{See H.R. REP. No. 105-77 on H.R. 867, "Adoption Promotion Act of 1997," April 28, 1997. "Final regulations have [not] been issued to clarify what steps a state or a court has to take to satisfy the requirement that reasonable efforts to reunify families [were] made."} Finally, the subsequent 1997 Act defines reasonable efforts only in the negative.\footnote{See 42 U.S.C. § 671(a)(15)(D). \"[R]easonable efforts . . . shall not be required to be made with respect to a parent [who] . . . has subjected the child to aggravated circumstances,\" or where the parent has "committed murder . . . voluntary manslaughter or aided or abetted therewith,\" where the parent has "committed a felony assault that results in serious bodily injury to the child,\" or where "the parental rights of the parent to a sibling have been terminated involuntarily."} That is, ASFA states when reasonable efforts should cease in favor of adoption and also when reasonable efforts should not be pursued, but ASFA never affirmatively asserts or clarifies what reasonable efforts are.\footnote{Id.}

Other problems with the 1980 Act can be viewed as resulting more from structural constraints than from ambiguity. One main structural problem was that the 1980 Act offered matching funding to children in foster care only where reasonable efforts were made.\footnote{Id.} Thus, the "consequence of a finding that a state agency failed to make reasonable efforts is a loss of federal funds for foster care expenditures."\footnote{Encouraging Adoption Hearings, supra note 52. (Statement of Congressman Clay Shaw, Chairman on the Subcommittee on Human Resources, Committee on Ways and Means). "I think it is very difficult to legislate reasonable efforts...it would be probably be more sensible to ask HHS to develop guidelines."} Because legislators and judges were aware that such a loss in funding would break down the child welfare system, they were reluctant to "enforce the federal reasonable efforts re-
quirement meaningfully.” Another problem in the way the law was structured was the case review requirement. Since judges and actors within the system had no incentive to jeopardize foster care funding through a finding of non-compliance, the case review system was reduced to “a mere production line . . . achieving only paperwork conformity with federal law.” Additionally, agencies and courts were overburdened, lacking the resources to make planning for permanency as required by the statute's case review system. Instead, they “developed ‘form’ court reports and court orders . . . .” Without rigorous application of the reasonable efforts requirement, and without the firm scrutiny of individual placements offered to children through the case review system, the Act became a hollow representation of a barely formed ideal.

III. THE ADOPTION AND SAFE FAMILIES ACT OF 1997: CHILD SAFETY AND ADOPTION

By the time lawmakers were considering the 1997 Act (ASFA), policy affecting child placement in foster care was progressing with an evolving social consciousness about the needs of children, and the effects of the losses of childhood on society at large. Increasingly, social expectations of the quality of an acceptable childhood experience became refined, perhaps incorporating some of the broader ideals of personal and societal fulfillment that arose from the previous decade’s interest in self-help, and perhaps resulting as a backlash against the earlier me-centered era. The late 1980’s through the late 1990’s saw a society reflecting on its collective spiritual deficits caused by an increasing focus on material wealth, and also saw the rise in our cultural desire to break down stereotypes by curing inequality from the inside out, rather than merely offering subsidies or empty programs. “Political correctness,” although later becoming the source of much debate and mockery, allowed us as a society to become sensitized to a variety of

105. Id.
106. Hope and Its Subversion, supra note 90, at 334.
107. Id. at 335.
108. Inclusion, supra note 2, at 144.
109. See Kenneth Lasson, Political Correctness Askew: Excesses in the Pursuit of Minds and Manners, 63 TENN. L. REV. 689, 689 (1996). “With the fullness of time, when all has been said and done . . . what has come to be called ‘Political Correctness’ will be revealed as little more than passionate folly — merely another skirmish in the eternal battle for the minds, hearts and souls of humankind.”
social problems including racial, gender and physical barriers. Along with a new desire to bring into the open some of society’s otherwise closeted issues, foster care could finally be studied as a symptom of the greater social ills that plagued our country.

ASFA captured a legislative awareness that damaged childhood experiences could not help but to produce unproductive citizens. Supporters of reforming the 1980 Act wanted to enunciate policy for children in foster care that supported a “common vision of a world in which each person has a sense of worth; accepts responsibility for self, family, community, and societal well-being; and has the capacity to be productive, and to help create nurturing families, responsive institutions, and healthy communities.” The goals here went far beyond placement; they extended to supporting a foster care policy that would contribute to raising healthy productive adults. More importantly, the new goals recognized that a stable and supportive parental relationship was an essential factor in the equation of raising healthy children. Certainly, the state of the national psyche, with its growing trend toward self-examination, permitted the legislative revelation that healthy children make healthy adults. Another important catalyst to the changes intended for foster care in ASFA was a new emphasis on “accountability,” and “family values.” Lawmakers attempted to translate these new concerns for accountability into effective policy for foster care children by focusing on a national responsibility.

110. Id. at 692. (Political correctness is a concept, “usually aimed at ‘raising consciousness about parts of our vocabulary that are saturated with implicit racism and sexism.’”) 111. Encouraging Adoption Hearings, supra note 52. “At issue here is America’s future. We are failing our children if we do not provide them with positive role models.” 112. Id. at 31. (Statement of Valora Washington, Program Director, Families for Kids Initiative, W.K. Kellogg Foundation, Battle Creek, Michigan). 113. Id. “[A]ll we can do is hope the best that we can that we have facilitated in taking children out of harm’s way into loving homes and thereby making a stronger and more productive country as these youngsters grow up to be productive.” 114. As Senator DeWine noted:

New research tells us that the first years of life are critical to a child’s development... Science is revealing... that early life experiences help determine the way a child thinks, learns and behaves for the rest of his or her life. That is why it is so critical for parents and care givers to raise children in a healthy, happy environment.


115. Encouraging Adoption Hearings, supra note 52, at 30. “[In attempting to reduce the time a child spends in foster care] we have tried to focus on accountability.” 116. See Robin R. Cockey and Deborah A. Jeon, The Family and Medical Leave Act at Work: Getting Employers to Value Families, 4 VA. J. SOC. POL’Y & L. 225, 228 n.10 (1996) (citing STEPHANIE COONTZ, THE WAY WE NEVER WERE: AMERICAN FAMILIES AND THE NOSTALGIA TRAP 94 (1992)). In 1998, Good Housekeeping magazine claimed that the emphasis on family [in the late 1980’s and early 1990’s] was “the biggest social movement since the 1960’s,” and was a “move toward the home and the family and traditional values.” The media heralded the 1990’s as “the Decade of Decency.” 117. 143 CONG. REC. S12,688, S12,671 (Nov. 13, 1997) (House concurrence in the Senate amendment to H.R. 867, comments of Senator Rockefeller). “If American child welfare policy does not succeed in providing
ASFA, would, therefore, need to make a grand departure from the 1980 model if it had any hope of improving the black hole of foster care. Because foster care policy was only given any real structure with the 1980 Act, such a departure needed to encompass all of the architecture of the law that had come before, keeping the framework for case reviews for example, but then the law needed to forge ahead by constructing a vision that was consonant with growing awareness of children's needs. The central ideal of the 1980 Act—permanency—survived because it provided a child-centered framework. However, permanency was no longer expected to be achieved solely through family preservation. Experts' awareness of childhood development had simply transcended our national reflexive desire to honor biology. Instead, legislators focused on the irreparable harms caused by extended stays in foster care and the potential horrors caused by failing to accept that some families could not be fixed, and that in some cases, no efforts were reasonable.

A. Refining Federal Foster Care Policy: Goals and Mechanics of the 1997 Act (ASFA)

Whereas the 1980 Act simply formulated a policy where one had not previously existed, the 1997 Act (ASFA) took a position against much of the practices that first shaped foster care reform. Thus, the major operational goals of ASFA were aimed at correcting specific failures of the 1980 Act. Congress addressed three major concerns. First, Congress attempted to remedy the concern that unreasonable efforts were being expended to preserve or reunify hopeless families. A number of high profile cases where children were either kept in, or returned to abusive homes only to be severely injured or murdered contributed to the legislative conviction that family...
preservation was not always the ideal. This was a profound and bold shift. This specific provision clarifies the reasonable efforts requirement by first stating that “the child’s health and safety shall be the paramount concern,” and by providing that under certain “aggravated circumstances,” such as in cases of abandonment, torture, sexual abuse, or when a parent has committed murder, reasonable efforts “shall not be required to be made.” This part of the statute aims at dismantling the family preservation ideal that had plagued so many judges and agency workers where their allegiance to parental autonomy posed such a threat to children.

The next important change is aimed at reducing the phenomenon known as “foster care drift.” Three significant features were added to the law in order to promote moving children out of foster care more swiftly. First, where it is determined that reasonable efforts are not appropriate because of “aggravating circumstances,” the state must hold a “permanency hearing” within thirty days in order to find permanent placement. Significantly, the language of the hearing requirement has also changed, suggesting the focus in the new law. Permanency hearings, once termed dispositional hearings, no longer accepted the idea of reporting a child's status. Instead, they are intended to require agency personnel to present a plan that contemplates a long-term situation. Additionally, “ASFA sanctions concurrent planning making efforts to reunify the family concurrently with efforts to find an alterative home for the child.” The purpose of this provision is to make a back-up plan for children in the event that a parent’s conduct becomes inappropriate during the reunification process.

Another provision aimed at reducing foster care drift is the requirement that states move to terminate parental rights, unless an exception applies, after a child has spent fifteen of twenty-two months in foster care. This provision seeks to create a fixed time limit for children waiting in limbo for their parents to rehabilitate, and reflects the concern that after the lib-

123. Shannon DeRouselle, Welfare Reform and the Administration for Children’s Services: Subjecting Children and Families to Poverty and Then Punishing Them for It, 25 N.Y.U. REV. L. & SOC. CHANGE 403, 419 n.110 (1999). The author cites the much-publicized case of Elisa Izquierdo, a six-year-old child who was abused for months before finally being killed by her mother despite the fact that child welfare officials “had received many reports.”


125. Encouraging Adoption Hearings, supra note 52. “[W]e must . . . be willing to terminate parental rights and move expeditiously toward adoption. So the big thing this bill does is to push the pendulum of government concern back in the direction of children.”

126. Inclusion, supra note 2, at 158.


128. NEFF, supra note 31, at 15.


131. 143 CONG. REC. S12,688 (Nov. 13, 1997). (House concurrence in the Senate amendment to H.R.)
eral application of the reasonable efforts requirement in the 1980 Act there was "no national consensus on the maximum time children should spend in foster care."\(^{132}\)

Finally, the 1997 Act (ASFA) brings the adoption incentive provision to the forefront of the law. Where the adoption provision was almost a silent fail-safe in the 1980 law because of the Act’s commitment to family preservation, it became part of a public campaign in ASFA.\(^{133}\) Adoption is also a crucial feature to ASFA because it provides a means to facilitate the new intolerance of parental failure. By deciding to give up on parents in the hopes of saving children, Congress was aware that some other mechanism, besides reunification, would have to propel children out of the foster care machine. The adoption incentive provision of ASFA offers a bonus to states for each child adopted above a predetermined baseline.\(^{134}\) Because states receive incentives for moving children out of foster care, this provision addresses the problem of agency inaction created by the prior law where funding was only received for children who were already in the foster care system. In addition to state incentives, the provision for subsidizing the adoption of children determined to have special needs continues from the 1980 Act.\(^{135}\)

Other measures aimed at more effective agency practices can be found in the recently adopted rules for ASFA. These rules supported a change in approach from the 1980 Act’s withdraw of funds for noncompliance to an initiative for revamping case review procedures that would put less emphasis on paper work and more emphasis on children. Under the rules, “[r]eviews to assure eligibility for Federally-assisted foster care [do] not address conformity with key requirements, but . . . assist States in improving their systems, thereby enhancing their capacity to serve children needing foster care placements.”\(^{136}\) By focusing on “substantial conformity” rather than “total compliance,” the administrator has attempted to move away from the formality of the paper work that became so mechanistically executed under the 1980 Act that it precluded true review.\(^{137}\) Thus, states

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867, comments of Senator DeWine).

132. Id. (Recognizing that a child’s sense of time is affected by their age, thus for a four year old, two years in foster care “is half of his or her life.”)

133. Proclamation No. 6947 (Oct. 29, 1996). “As a nation we must continue to work to remove obstacles to adoption, to recruit new adoptive families . . . . Nothing should stand in the way of providing every boy and girl in America the permanent, loving home each of them deserves.”

134. 42 U.S.C. § 673b(d)(1). "$4,000, multiplied by the amount (if any) by which the number of foster child adoptions . . . exceeds the base number,” and an additional $2,000 for “special needs adoptions.”


137. 45 C.F.R. § 1355.32 (2000). “A State [must be] found to be operating in substantial conformity during
will be less concerned with passing their reviews than with participating in the development of better procedures.

B. Criticisms

Despite the bold efforts of legislators to redefine national goals and policies affecting children in foster care, scholars have already begun to project ASFA’s failures. Among the chief criticisms of the 1997 Act, many scholars argue that the statute goes too far in the direction away from family preservation, and claim that adoption is over emphasized, cutting short efforts toward sustaining viable families. Specifically, some have criticized states’ incentives claiming they make efforts to fast track adoptions more appealing and threaten the integrity of genuine family preservation goals.

Concurrent planning, a major feature of ASFA’s adoption emphasis, suffers from a similar conflict because it is designed specifically to honor two inherently competing goals. The first goal is for the agency to make reasonable efforts to preserve the existing biological family; the other is for the agency to prepare for the failure of those efforts by finding a permanent home before termination. The strength of this provision is that it may substantially cut the time a child spends in foster care after termination. The obvious flaw is that concurrent planning constrains the efforts of agency workers by putting them in “a schizophrenic position.”

These criticisms are valid considering that ASFA restates the sanctity of families, stating explicitly, “[N]othing in this Act is intended to disrupt the family unnecessarily or to intrude inappropriately into family life, to prohibit the use of reasonable methods of parental discipline, or to prescribe a particular method of parenting.” Moreover, ASFA has not abandoned the family preservation model, but merely subordinated it to child safety and permanency timeline goals. The operative reasonable efforts language still

an initial or subsequent review in order to receive funding. States found not to be in substantial conformity will “be required to develop and implement a program improvement plan.” (emphasis added).

138. See generally Gordon, supra note 122.
140. Id. (“These federal incentives to move children out of foster care steer states in one direction. They encourage states to get more children adopted.”)
141. See 42 U.S.C. § 671(a)(15)(F) (stating that “reasonable efforts to place a child for adoption or with a legal guardian may be made concurrently with reasonable efforts . . . to preserve and reunify families.”
142. SHATTERED BONDS, supra note 139. Roberts argues that “[g]iving agencies the conflicting missions of reuniting foster children with their families while preparing them for adoption is likely to dilute agency efforts at family preservation,” namely because “offering bonuses for adoption . . . weakens even more case-workers’ incentives to keep families together.”
requires that agencies continue to work toward eliminating a need for removal or reunification unless one of the two ASFA exceptions, either the existence of aggravating circumstances, or the exhaustion of reasonable efforts, is met. Therefore, during foster care proceedings, absent one of these two conditions, we should still be trying to sustain families.

In order to keep the benefits of adoption in perspective, especially when adoption threatens family preservation, we should consider that efforts to promote adoption can, in some ways, be falsely comforting, both to legislators and the public. Adoptions were heavily emphasized during the Clinton administration and offered one of few opportunities to join an increasingly divided Congress in bipartisan legislation. ASFA’s legislative history is often heavily cloaked in “child saving” rhetoric that perhaps overshadows some of the more contentious issues between Republicans and Democrats in Congress. Few would argue against a bill that proposed saving America’s children.

The public’s wholesale acceptance of the adoption solution suffers from the assumption that legislators are fully unified, fully informed, and fully aware of the real implications of changes to foster care laws. Equally, those who reject the adoption incentive provisions of ASFA as an effort by Congress to systematically eliminate poor minority families, make arguments that suggest that a single cohesive legislature joined together to consider the potential of the law and designed an outcome beyond an immediate politically pressing need. In truth, much legislation works like deal making with many legislators only briefly informed, and even then, a greater amount of energy may be spent considering the political impact of aligning oneself with a given piece of legislation than about the provisions within the

144. 42 U.S.C. § 671(a)(15)(A), (B) (states that “in making such reasonable efforts, the child’s health and safety shall be the paramount concern; except . . . [for aggravated circumstances], reasonable efforts shall be made to preserve and reunify families”) (emphasis added). Clearly, aggravated circumstances and the exhaustion of time limits where efforts have been made were the only exceptions to the family preservation model under ASFA and therefore planning should intend to effect reunification until an exception applies.

145. Proclamation No. 7145, 63 Fed. Reg. 59, 203 (Oct. 29, 1998). “My administration will continue to support efforts to recruit and strengthen adoptive families and to shorten the time it takes to move children from foster care to permanent homes . . . .”


147. 143 CONG. REC. H2012 (daily ed. Apr. 30, 1997) (statement of Rep. Pryce) (“The bipartisan support this bill enjoys is clear evidence that building stable families by promoting adoption is a goal that both political parties can and should agree upon.” “The most important change we can make is to elevate the rights of children because too often a foster child’s best interests are abandoned while courts and welfare agencies drag their feet.” (emphasis added)).

law itself.\textsuperscript{149} Thus, the criticism here may be better characterized as a lack of contemplation rather than purposeful policy making designed to affect a sinister outcome.

In addition to the adoption incentives, some have argued that the kinship exception to the requirement for termination after a child has been in foster care for fifteen of twenty-two months,\textsuperscript{150} is also squarely at odds with ASFA’s goals of putting the child’s health and safety first.\textsuperscript{151} Specifically, the exceptions, which allow states not to pursue termination where a child is in kinship care, and where the agency has failed to make reasonable efforts conflict with a child’s best interests. In the case of kinship care, a child is no less in need of permanent placement because the temporary caregiver is a relative. Where the kinship caregiver is willing to adopt, the reluctance to speed up parental termination frustrates the Act’s purpose.\textsuperscript{152} This provision harks back to complaints about the 1980 Act’s failures resulting from judicial reluctance to terminate parental rights because children were deemed safe in their temporary placements. Similarly, when the failure to begin termination results from a finding that reasonable efforts were not made, the emphasis is on fairness to parents and not on the best interests of children.\textsuperscript{153} To compound the problem of states’ refusal to begin termination after fifteen months where reasonable efforts were not made is the fact that the Act fails to “address the shortage of parental services” that are necessary to find that reasonable efforts were made.\textsuperscript{154}

Another criticism is that ASFA is insensitive to the age differences in children and thereby “treats different children identically.”\textsuperscript{155} While an infant may be greatly harmed by the fifteen-month wait for termination, proceeding too quickly may harm older children.\textsuperscript{156} Because infants have a better chance of being adopted than older children, their adoption opportunities

\begin{footnotes}
\item[149] See Richard I. Nunez, \textit{The Nature of Legislative Intent and the Use of Legislative Documents as Extrinsic Aids to Statutory Interpretation: A Re-examination}, 9 CAL. W. L. REV. 128, 131-35 (1972), reprinted in \textit{LEGISLATIVE LAW AND PROCESS: CASES AND MATERIALS} 439 (Otto J. Hetzel, Michael E. Libonati \& Robert F. Williams eds. 2000) (1980). I have imported this argument of what I call the “myth of the unified legislator” from Nunez’s work concerning statutory interpretation. According to Nunez, \[t\]he fiction enters when we assume that a legislative body, composed of several hundred individuals, was of a single mind in formulating an intent on a specific segment of a statute as it applies to a problem that was not anticipated …. Anyone who has observed or participated in the legislative process is aware of the numerous diverse motives and understandings that produce a final statute.
\item[150] 42 U.S.C. § 675(5)(E).
\item[151] Gordon, supra note 122, at 637.
\item[152] \textit{Id.} at 659. “[C]hildren do not benefit from failure to pursue adoption when a kinship caregiver wishes to adopt.”
\item[153] \textit{See id.} at 660 (“Once again, the rule [that is] fair to adults is harmful to children.”).
\item[154] \textit{Id.} at 664.
\item[155] \textit{Id.} at 667.
\item[156] \textit{Id.}
\end{footnotes}
"diminish quickly with age.”\textsuperscript{157} Moreover, since infants are also least likely to be affected by severing biological ties with parents, swifter termination procedures would better benefit younger children.\textsuperscript{158} Older children, on the other hand, are more apt to be attached to parents and may benefit more from a continued, even if inadequate, relationship with their biological family.\textsuperscript{159} Furthermore, because older children are less likely to be adopted than infants, moving quickly to terminate parental rights only serves to leave these children in an assured state of continual uncertainty.\textsuperscript{160} But despite the undesired effects of the “exception” provisions, they are not fatal to the statute’s success and would require only future refinement so that another provision would be triggered to guard children’s interests in the event that one of the exceptions was deemed harmful.

IV. PROJECTIONS AND RECOMMENDATIONS: THE FUTURE OF FOSTER CARE POLICY

Putting the inherent weaknesses of ASFA aside, some have already begun to take a command from Congress’s call to view foster care laws as “policy making in progress”\textsuperscript{161} and have begun to look beyond ASFA.\textsuperscript{162} One way to assure that foster care laws evolve along with our national consciousness concerning the needs of children is to remain vigilant in congressional oversight. Such vigilance should include attempting to harmonize laws that naturally address overlapping issues. Another way to continue to develop better ways to care for children in foster care is to stabilize care for children within the foster care setting when accelerated termination does not assure adoption.

\textit{A. Continued Training: The Strengthening Abuse and Neglect Courts Act of 2000}

Since the passage of the ASFA, and certainly in large part because of the failures of the 1980 Act, developments in foster care law have begun to reflect a commitment to constant reexamination. After the 1980 Act, legislators acknowledged the weaknesses of attempting to cover the whole world of foster care in one law, and now step more lightly toward attempting to create

\begin{itemize}
\item \textsuperscript{157} Gordon, \textit{supra} note 122, at 667.
\item \textsuperscript{158} See id.
\item \textsuperscript{159} See id.
\item \textsuperscript{160} See id.
\item \textsuperscript{161} 143 CONG. REC. S12,668, 668-70 (daily ed. Nov. 13, 1997) (statement of Sen. DeWine) ("[W]e should make no mistakes about the challenges ahead. We stand only at the very beginning of a long struggle to save America’s children.").
\item \textsuperscript{162} See \textit{Hope and Its Subversion}, \textit{supra} note 90, at 353.
\end{itemize}
The Strengthening Abuse and Neglect Courts Act of 2000 ("SANCA") seeks to achieve efficiency by facilitating ASFA's stringent timelines in three significant ways: (1) training, (2) tracking, and (3) expansion of the court appointed volunteer program. SANCA aims to reduce case backlogs by providing funds to states\(^\text{165}\) for training "judges, court personnel, agency attorneys, guardians ad litem, volunteers...and attorneys who represent children."\(^\text{166}\) In passing SANCA, Congress acknowledged that ASFA's requirement that termination begin once the family preservation goal in any case is abandoned acts as an empty directive if not backed up by court resources to process such terminations.\(^\text{167}\)

While SANCA addresses the need to fortify practical resources for processing foster care cases, such as the need to extend court hours and to temporarily hire judges to reduce case loads, SANCA's primary means of achieving efficiency in moving children in foster care to permanency is through training for key players in the foster care system, including agency

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164. 146 CONG. REC. H8690-701, H8694 (daily ed. Oct. 3, 2000) (statement of Rep. Johnson) ("Implementation of ASFA has resulted in an unprecedented sixty-four percent increase in adoptions out of foster care since 1996. As a direct result of ASFA...new pressures have been put on state courts to hold permanency hearings, implement permanency plans, make judicial findings, and finalize adoptions . . . .").
165. Id. at H8692. The statute authorizes appropriations through 2002 in the amount of $10,000,000 for making grants to states.
166. Id. at H8690 ("[T]he administrative efficiency and effectiveness of the Nation's abuse and neglect courts would also be improved by the identification and implementation of projects designed to eliminate the backlog of abuse and neglect cases . . . .").

The Adoption and Safe Families Act of 1997 . . . placed additional responsibilities upon courts requiring that they take an even more vigilant role in monitoring and handling child abuse and neglect cases. Additional judicial oversight, shortened timelines, and increased accountability on the part of the child welfare agencies and courts alike were required to assure that children were moved to permanency at the earliest possible time . . . . Once again a new federal law was passed to guide states in improving court practice in child abuse and neglect cases. And once again, adequate resources to ensure the training of every judge handling a dependency docket nationwide were not available.

Id.
lawyers, judges, and court personnel. Proponents of SANCA recognized a need to achieve uniformity in the application of ASFA guidelines, especially in light of the harms caused by inconsistencies in the application of the reasonable efforts requirement associated with the 1980 Act. If the 1980 Act proved anything, it was that more than the articulation of a national policy would be needed. Instead, progress for children in foster care requires collective understanding and conformity to unified standards, not so much on the part of Congress as on the part of the daily actors.

The second important goal of SANCA is to provide funding for more effective tracking mechanisms within the courts and in cooperation with agencies in order to assure that ASFA time requirements for moving toward termination can be met. Namely, state court administrators have expressed a need to be able to identify children who have been in foster care for twelve months or more in order to initiate the permanency planning contemplated by ASFA. In addition to tracking the time a child has spent in foster care, tracking funds are intended to monitor parental compliance with court orders and thus allow courts to avoid delay in reevaluating parental fitness, or allow courts to proceed with termination once unfitness has been established.  

168. Id. (Statement of Mark Hardin, Director, Child Welfare, Center on Children and the Law, ABA.) Attorneys largely control the flow of information to the judge. When attorneys are unaware of vital facts important to the children's safety and treatment . . . judges' decisions may well be ill informed or even tragically mistaken . . . [Agency attorneys] must be willing to pursue the difficult and challenging cases and not wait years for them to become easier because the child has already stayed so long in foster care.

169. Id. (Statement of David E. Grossman, of the Hamilton County Juvenile Court, Cincinnati, Ohio, for the National Council of Juvenile and Family Court Judges.) Judges and court personnel are pivotal and important, [however] they cannot have a positive impact upon court and practice systems at the grassroots jurisdictional level until resources allow for training . . . . Judges do not change how they do business unless they are convinced they need to do so . . . . No law can 'go on the books' and be effective unless practitioners understand the intent and spirit of the law, and the expectations of all parties in carrying out the mandates of the law.

170. Id. [Judges and other key system players who had not had the benefit of training regarding the [1980] Act misunderstood the 'reasonable efforts' provision of the Act, thinking that 'reasonable efforts' was synonymous with 'every effort' to return a child home. In spite of the [1980] Act's intent, children were being returned home to unsafe situations and being harmed as a result of misconception and lack of understanding as to what the law intended.]

171. Id. Studies conducted in association with typical practices under the 1980 law indicate that "practices varied widely from legislation around adherence to time lines . . . . In fact, fifty-four percent of respondents indicated that time frames or other statutory guidelines as set by the law were 'loosely adhered to' in actual practice."


174. Id.
Before SANCA court systems lacked the funds to provide automated interfacing of information between courts, law enforcement, and social service agencies, a necessary step toward satisfying the requirements of processing cases in the timeframe required by ASFA.\footnote{Id.}

The final important provision aimed at moving abuse and neglect cases more efficiently to completion under SANCA is the extension of funding to expand the court-appointed special advocates ("CASA") program into underserved communities in order to assure individualized care of each case in the system.\footnote{146 CONG. REC. H8690-01, H8690 (daily ed. Oct. 3, 2000). "Volunteers who participate in court-appointed special advocate programs (CASA) play a vital role as the eyes and ears of abuse and neglect courts in proceedings conducted by, or under the supervision of, such courts and also bring increased public scrutiny of the abuse and neglect court system."} CASA volunteers are "citizen volunteers appointed by, the juvenile and family courts in cases of child abuse, neglect or abandonment."\footnote{Child Protection Hearings, supra note 167, at 1 (statement of Christine Delay, volunteer Ft. Bend County Child Advocates Program, Richmond, Texas).} Because CASA volunteers are dealing with only one or two cases at a time, unlike caseworkers and judges; therefore, they are able to coordinate the efforts of each participant in a child's case towards resolution.

While SANCA's reach is modest compared to the more ambitious goals articulated in ASFA, it is significant because it illustrates the importance of vigilant oversight in child welfare policy, especially related to foster care where advances can only be made by changes to legislation and not through case law. Much like ASFA, SANCA is intended to address specific gaps in an existing law.\footnote{146 CONG. REC. H8690-01, H8693 (daily ed. Oct. 3, 2000) ("While ASFA's accelerated timelines are essential to promoting stability and permanence for abused and neglected children, these timelines, along with grossly insufficient funding, have resulted in continued prolonged stays for abused and neglected children in the foster care system . . . ").} Unlike ASFA, which came seventeen years after the first attempt at creating defined goals for children in foster care, and only after so much had already gone wrong for children under the 1980 law, SANCA comes just three years after ASFA with the hope of preventing a future rupture in an already overtaxed system.

\textbf{B. ASFA and Welfare: The Collision of Poverty and Neglect}

The 1961 expansion of welfare benefits to unemployed primary wage earners and dependent children in foster care was the last time that welfare and foster care policy operated in concert. The 1980 Act separated the two related policies. The result of the disharmony between welfare and foster care is that both laws, rather than having the potential to make powerful and positive impact on children because of their alignment, now have potentially
devastating consequences because of their oppositional forces. Because both ASFA timelines for beginning termination and welfare restrictions for receiving aid under the Personal Responsibility Act are not coordinated, and because the majority of children in foster care are from impoverished homes, the intersection of both laws virtually promises a collision.

Recent changes in welfare laws\textsuperscript{179} initiated by the 1996 Welfare Reform campaign, and resulting in the passage of the Personal Responsibility and Work Opportunity Act of 1996, ("PRWOA")\textsuperscript{180} increase the possibility that more parents will be unable to care for their children and that those children will enter foster care because of poverty related neglect such as lack of adequate housing, food, or child care.\textsuperscript{181} Unlike AFDC, which provided an entitlement to benefits for certain needy families, under PRWOA, aid is now limited to sixty months, unless within a state’s twenty percent allowable exception,\textsuperscript{182} and offered conditionally under the Temporary Assistance for Needy Families ("TANF") block grant.\textsuperscript{183}

The threat to children under welfare reform is fast approaching a critical state because of the numbers of families expected to fall off of the welfare roles — those that will reach the theoretical sixty-month maximum for lifetime benefits allowed under the PRWOA. The numbers are theoretical and therefore complicated because the federal maximum is a ceiling and not a floor. States are permitted, and many have, to set lower lifetime limits.\textsuperscript{184} Child welfare advocates have thus scurried in attempts to find estimates of the numbers of families that will be affected by time limits. The best number is an estimate of approximately 125,000 families who had their assis-

\begin{footnotesize}
\begin{enumerate}
\item See Martin Guggenheim, The Foster Care Dilemma and What to Do About It: Is the Problem That Too Many Children Are Not Being Adopted out of Foster Care or That Too Many Children are Entering Foster Care?, 2 U. Pa. J. Const. L. 141, 145 (1999) [hereinafter Foster Care Dilemma] (book review).
\item [C]hildren raised in severe poverty plainly need the beneficence of state aid. Unfortunately, the United States appears to be on a deliberate course to reduce financial support systems for poor families. . . . [T]he almost certain trend for the future is an increased use of foster care because it continues as the only remaining source of government largesse . . . ."
\item Personal Responsibility and Work Opportunity Act, supra note 179.
\item In addition to the time limits, assistance is conditioned upon a recipient’s employment within twenty-four months of receiving benefits. Further, teenage parents must be either living with an adult or attending a high school or equivalent training program.
\item CLASP State Policy Documentation Project, at http://www.spdp.org/tanf/timelimits/timelimitexpl.htm. For example, Connecticut has limits at twenty-one months. Arkansas and Indiana have both set limits at twenty-four months. Georgia and Florida have limits set at forty-eight months. See also MARK GREENBERG & STEVE SAVNER, A DETAILED SUMMARY OF KEY PROVISIONS OF THE TEMPORARY ASSISTANCE FOR NEEDY FAMILIES BLOCK GRANT OF H.R. 3734 (1996). Not all states have elected time limits because the statute only imposes limits for federal funds. States are permitted to provide funding beyond the federal maximum.
\end{enumerate}
\end{footnotesize}
The significance of the impact of welfare time limits on children in foster care is that because ASFA and PRWOA are not coordinated, and both have strict timelines, children whose parents lose welfare funding will many times wind up in foster care for conditions which warrant intervention under the state's abuse and neglect laws. However, the problems necessitating removal from the home are frequently those primarily related to poverty. Thus, the PRWOA often times unwittingly funnels a child from welfare to foster care, and then in the interest of permanence, ASFA, which along with state statutes, makes no distinction between poverty and neglect for the purposes of its reasonable efforts requirement, swiftly terminates parental rights.

Accordingly, a significant goal of future changes to this law should be to distinguish between failed parenting that cannot be rehabilitated and poor, but fit parents who need only financial support to provide a loving home. While few would argue with Congress's desire to unhinge children from parents whose purposeful behaviors, whatever the reason, cannot be rehabilitated, the success of this goal rests on a careful analysis that is often made up of flawed assumptions.

First, parents unable to provide for their children are not necessarily unfit because they are poor. Although poverty is frequently an indicator of other harmful behaviors, such as substance abuse, absent harm to children
that cannot be remedied by simple funding there is little justification for removing children from their families for lack of income alone. There is evidence that a very definable group of parents who are fit but simply too poor to provide for their children could benefit from a distinction in the neglect categorization of child welfare laws. Indeed, one estimate claims that “no more than ten percent of the children in foster care are there because of serious abuse” suggesting that the severity of abuse that cannot be rehabilitated exists along a continuum.190 While it is not clear exactly how many of the remaining ninety percent of families could be very easily helped with funding, any number is worth pursuing because if children can remain safely in loving homes everything we know now about child welfare makes clear that such a solution is better for children. Thus, attempts at preservation before termination proceedings begin should be considered rather than rigid adherence to strict timelines that apply to every case.191

ASFA’s time goals address the predicament of children whose families cannot be saved and should not be saved, however, the remaining more questionable cases should be reckoned with to assure outcomes that are best for children. One of the complicated factors in deciding when to pursue preservation is the tangled relationship between poverty and neglect in child welfare law. Most legal definitions characterize neglect as volitional. Thus, neglect is said to exist when parents are not caring for their children “in ways that are clearly within their control.”192 Consequently, most child welfare experts agree that “[d]efining neglect as an omission within the parents’ control means that poverty alone is not a sufficient criterion of neglect unless parents choose to be impoverished.”193 Poverty, on the other hand, has been defined as “an absolute lack of money based on calculations of what a family needs to subsist.”194 Taken together, these definitions make it clear that poverty is not neglect unless other harmful behavior occurs with it. Many state

190. Somebody’s Children, supra note 188, at 1724-25.
191. Foster Care Dilemma, supra note 181. See also Justice, supra note 148, at 118; Somebody’s Children, supra note 188, at 1735.
193. Id.
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statutes formally recognize the distinction between poverty and neglect yet give the distinction no meaning because state statutes impose a minimum of care that must be established for children that overrides the question of fault or cause.\textsuperscript{195} Therefore, since current policy does not distinguish between poverty and neglect, abysmal conditions of poverty, without an available exception, often warrant removal.

Rather than permitting poverty to be captured in the category of neglect, a neglect inquiry would serve children better if it rested upon fitness and ultimate childhood wellbeing.\textsuperscript{196} By making parental fitness the primary concern, we are better able to separate out those cases where a continued subsidy would allow a family to remain together from those hopeless cases envisioned by Congress under ASFA. Providing funding to preserve functioning but poor families is also consistent with the best interests of the child standard because preservation in these cases offers children the necessary components for stability, namely permanence, so honored by the foster care funding laws from their beginning. Since the 1970’s, with the expanding awareness of the immediacy of children’s needs, most jurisdictions have applied the best interests of the child standard in child welfare cases.\textsuperscript{197} Yet, in the case of poor but otherwise fit parents, best interest inquiries are often usurped by personal responsibility rhetoric. Since the best interests standard dominates child welfare law, it makes sense that this standard should equally mandate the extension of benefits when doing so is better for children.

Focusing on fitness is also consistent with constitutional limits on the state’s intrusion into family matters. In abuse and neglect cases, the scope of the inquiry is not whether better parents can be found. If this were the case, “[t]he welfare of many children might be served by taking them from their homes and placing them in what the officials consider a better home.”\textsuperscript{198} Instead, the emphasis must be on whether preserving a family will come to harm children.

\textsuperscript{195} DeRouselle, supra note 123. The association with poverty and neglect persists in determining when children are placed in foster care despite state statutes, which require an element of willfulness in a finding of neglect. See, e.g., under New Jersey’s Abuse and Neglect statute, N.J.S.A. 9:6-8.21(c), a child is neglected if the “child’s parent fails to exercise a minimum degree of care . . . though financially able to do so.”(emphasis added). New York makes a similar distinction; however, the author states that because this provision does not eliminate a need for protecting children in poor families when their parents are unable to care. Thus, “courts do not interpret [such a provision] as barring a finding of neglect for poverty.”

\textsuperscript{196} Michael Wald, State Intervention on Behalf of “Neglected” Children: A Search for Realistic Standards, in CHILD ABUSE AND NEGLECT CASES AND MATERIALS (Robert D. Goldstein, eds. 1999). An alternative to the “fitness” standard proposed in this paper is one offered by Wald in which the inquiry would be fixed entirely on “evidence to specific harms to the child.” The benefit of this standard is that it remains focused on the child because it contemplates more severe harms potentially suffered in foster care or from termination itself.

\textsuperscript{197} See, supra note 39.

\textsuperscript{198} In re Adoption of R.I., 361 A.2d 294, 298 (Pa. 1976) ("A child cannot be declared ‘neglected’ merely
Moreover, the United States Constitution protects the “freedom of a parent and a child to maintain, cultivate, and mold their ongoing relationship.” Although this right is not absolute, its denial can only be based upon a compelling interest. Because the cost of funding children in foster care, both in services under the reasonable efforts requirement and adoption incentives to states and post-adoptive parents, is substantially more expensive than welfare payments, it cannot be argued that the interest is compelling when a less costly and less detrimental alternative exists.

Additionally, with much of the pressure for welfare reform resulting from the outcry of taxpayers, an exception for continuing funds to parents for children who would face foster care could easily be justified as more economically responsible. While it could easily be argued that a continuation of TANF benefits runs counter to the philosophical and political tenor of personal responsibility advocated for under welfare reform, denying children the right to safe and loving homes because of poverty is equally opposed to the best interests ideal. Moreover, making a distinction for poverty related neglect in the case of fit parents would not create an additional expense. The government already pays to sustain children from desperately poor families in foster care and after adoption, but the government does so at a substantially higher cost, and often with tragic results.

Unlike economic costs, other costs cannot be measured but can be easily imagined. When childhood fails children, children fail society. Ultimately, we pay to subsidize families, either directly before too much damage is done, or indirectly through the inefficiencies of foster care costs and later into adulthood, when children grow to perpetuate the harms put upon them. Nothing in the legislative histories of either law reveals an intention to create such an effect. Instead, the absence of any reference between foster care and welfare in either the text of the law or the history of the legislation suggests indifference.

Accordingly, Congress should devote the resources necessary to define what has become known as poverty-related neglect, and more importantly to determine the population that is affected. Once defined, both ASFA

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201. SHATTERED BONDS, supra note 139, at 27. According to Dorothy Roberts, “The median monthly TANF benefit is only about half of the median foster home maintenance stipend. In California, in 1996, the monthly stipend for two children aged eight and sixteen totaled $859, whereas AFDC benefits for the same children were only $479.”
202. Braveman & Ramsey, supra note 194, at 448 (“Congressional rhetoric [in welfare reform] acknowledged the potential harm of welfare benefit reductions to children . . . focused on job training for adults as the solution. For the most part . . . the question of what will happen to children of parents who lose, or are not eligible for benefits, was ignored.”).
and TANF provisions could be coordinated and a separate category could be created under both laws that would untangle the notion of poverty from the legal definition of neglect. This solution would allow for a continuation of TANF benefits for the sole purpose of preserving fit homes and avoiding the trigger of removal and termination under ASFA’s timelines.

Another flawed assumption under ASFA is that a child automatically benefits from parental termination. Without a waiting and loving adoptive family, termination can do more harm than good. Even if we reject the estimate that the potential for preservation is as high as ninety percent — because that number includes all children not placed for severe abuse and therefore may include a group still significantly at risk — a more conservative account of the numbers of children removed for neglect that can be remedied is worth exploring. This is especially true because a mistake in the decision to terminate could subject a child to years of foster care placements with more potential harm than the grounds that warranted removal.203

Furthermore, the adoption goal has not met Congress’s highest hopes because more children are freed for adoption than can be adopted.204 When parental rights are terminated but children are not adopted, those children will be assured the very lack of continuity (multiple and lengthy foster care stays) that ASFA was designed to prevent. This flaw in the law can be ameliorated by the poverty and neglect distinction suggested above. This separate categorization will assure that children will not be inappropriately removed. Additionally, efforts to stabilize foster care will assure that placement and termination in the absence of waiting adoptive parents can mirror a more ideal childhood experience.

C. Stabilizing the Foster Care System From Within

Scholars recommend that Congress put efforts into “stabiliz[ing] temporary foster care placements, [by] establishing a significant degree of permanency within the foster care system itself.”205 This could perhaps be accomplished by devoting funding under SANCA to train foster care parents to make foster care a more loving and quality childhood experience for those

203. Id.
[T]here is substantial evidence that except in cases involving very seriously harmed children, we are unable to improve a child’s situation through coercive state intervention . . . . In fact, under current practice, coercive intervention frequently results in placing a child in a more detrimental situation than he would be in without intervention.

204. Id. (“Because many of the children whose family ties are severed won’t be adopted, the policy may actually result in a net increase in the foster care population.”).

205. Id.
children who must be placed. This suggestion is less a criticism of ASFA and more an attempt at incorporating some of what we have learned as a society about children and childhood.

V. CONCLUSION

ASFA makes the necessary departure from the 1980 Act by making bold declarations that represent a "baseline measurement that we can, as a humane, caring society, satisfy ourselves that abused and neglected kids are properly being cared for." This baseline could only have been established through the rejection of the earlier 1980 law's approach. The 1961 Act provided no such baseline for which the 1980 Act could respond or reject. Despite the significant shift in emphasis from family preservation in the 1980 Act to safety in ASFA, what is most illuminating in Congress's changed perspective from one statute to the next is not the changing law, but rather the acceptance that the law will always be essentially limited to what we know, or what we are willing to begin to know as a society. Lawmakers were humbled by the failures of the 1980 statute and crafted the 1997 law not with the hopes of cementing an ideal, but rather of creating a "cornerstone for future efforts on behalf of abused and neglected children." This Act was not intended to be a final statement but rather one more step in a work in progress. Thus, ASFA can be most credited with insisting upon leaving an opening for future reexamination that, through Congress's admitted limitation will always aspire to the next level of societal expectation. The coming collision between welfare and foster care laws suggests that it is already time to make the next step.


207. See supra note 114, at S12671. (Comments of Senator Rockefeller). "[W]e have crafted the beginnings of a solution. It is that . . . the beginnings of a solution to this problem." Id. at S12670 (Comments of Senator DeWine) (emphasis added).